

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**FRESH DIRECT, LLC AND UTF TRUCKING, INC.,
A Single Employer**

and

Case 29-CA-26684

**LOCAL 810, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO**

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for the General Counsel
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New Jersey, for the Respondent
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DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in New York, New York, on February, 14, 15 and 16, 2005. The Complaint, dated December 23, 2004, alleges that Respondent, in violation of Section 8 (a) (1) and (3) of the Act interrogated an employee, confiscated and destroyed Union materials from an employee and discharged employee Greg Schellenberg. Respondent denies that it has engaged in any violations of the Act.

On January 4, 2005 the Regional Director for Region 29 consolidated the Complaint for purposes of hearing with a hearing in Case 29-RC-10245 on Objections filed by Local 810 as the result of an election held on September 28, 2004. On October 11, 2005, on motion of Local 810, the objections case was severed from the unfair labor practice case and the objections were remanded to the Regional Director for withdrawal.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party and the Respondent in April 2005, I make the following¹

Findings of Fact

¹ The record is hereby corrected so that from page 5, line 17, to page 6, line 2, Ms. Krieger is speaking; at page 21, line 7, the correct date is July 16th.

I. Jurisdiction

Fresh Direct, LLC is a Delaware Limited Liability Company with an internet based food and grocery business. UTF Trucking, Inc., is a domestic corporation solely engaged in delivering Fresh Direct, LLC products by truck to customers located in Manhattan, Brooklyn, and Queens, New York. Fresh Direct, LLC and UTF Trucking, Inc., are affiliated business enterprises with common premises and principal offices and places of business which are located in the same facility at 23-30 Borden Avenue, Long Island City, New York. They share common ownership, directors, management and supervision and have formulated and administered a common labor policy affected employees of both operations, provided services for and made sales to each other, interchanged personnel with each other and have held themselves out to the public as a single integrated business enterprise. The parties agree, and I find, that Fresh Direct, LLC and UTF Trucking, Inc., constitute a single integrated business enterprise and a single employer, herein called Respondent, within the meaning of the Act. Respondent annually derives gross annual revenues in excess of \$500,000 from the sale of groceries and other products and purchases and receives at its Long Island City facility goods and products valued in excess of \$5,000 directly from points outside the State of New York. The parties agree, and I find, that Respondent is an employer within the meaning of Section 2 (2), (6) and (7) of the Act. The parties agree, and I find, that International Brotherhood of Teamsters, Local 810, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2 (5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

The Business of Respondent

The business methods of the company were described by Jim Moore, Respondent's senior vice president of human resources and general counsel. Respondent delivers groceries and food to customers pursuant to orders which are placed using the internet. Respondent made its first delivery in July 2002 and at the time of hearing was making between 30,000 and 32,000 deliveries per week. A customer goes to Respondent's web site and chooses the items to be purchased and delivered. The customer also selects a date of delivery and a delivery time "window". Except for special holiday times, a delivery time window is 1 ½ to 2 hours long. The company agrees to deliver the order within the window chosen by the customer.

Respondent operates a facility in Long Island City where food and groceries are stored and where individual customer orders are put together in a highly organized system of retrieval and packaging. Orders for each individual customer are packaged in cartons which are labeled with all the information necessary for delivery. The orders are delivered by the company's trucks in one of two ways. "Delivery" trucks are driven around the City streets and stopped near the residence where an individual delivery is to be made. A helper who rides with the truck driver makes deliveries to the individual residences. "Depot" trucks leave the warehouse and take up positions in certain neighborhoods where a large number of deliveries are to be made during several time windows each day. The depot trucks are met at their stationary positions by employees called runners who remove the cartons from the trucks and take them by handcart to the customers' residences, usually a distance of several city blocks.² When a depot truck has

² Some witnesses referred to "runners" as "walkers." The parties agree that the terms are interchangeable.

been emptied and the runners have made all the deliveries, another full depot truck may arrive to take the place of the empty truck. The runners stay at the depot location throughout the day and make deliveries during the various time windows selected by the customers.

Due to changes in the availability of space in which to park a depot truck, the depots change location on occasion. Thus, a depot truck may be parked at Broadway and 93rd Street and then shift to a place on Broadway one or two blocks away when a location becomes unavailable as a result of construction or congestion. Further, community complaints may require changes in the parking of depot trucks.

On Monday, Tuesday, Wednesday and Thursday the first delivery window begins at 2 pm.³ On those days all the "delivery" trucks leave the warehouse no earlier than one hour before the first delivery window. On Monday, Tuesday, Wednesday and Thursday "depot" trucks leave earlier than the delivery trucks so that they will have time to get into position, meet the runners and organize the materials on board the trucks. On these days, the depot trucks leave the warehouse at noon so that the runners will be able to make the first delivery window at 2 pm. Moore testified specifically that at the Broadway and 93rd Street depot location, the Monday, Tuesday, Wednesday and Thursday deliveries begin at 2 pm and the runners are instructed to meet the truck at 1:45 pm.

On Friday, the delivery windows generally begin at noon and on Saturday and Sunday the delivery windows begin at 7:30 am.

Solange Cliff was called to testify by Respondent. She has been employed by the company since February 2004 as a runner and then a helper and now she works in the office. Cliff worked as a runner for six or seven months. She worked at a depot which was located variously on 93rd, 94th and 95th Street and Columbus Avenue. This depot was moved two blocks west to Broadway and 93rd Street at some point. The depot truck has at various times been stationed at 92nd and Broadway or 94th and Broadway. The first delivery window for this depot begins at 2 pm except for Friday, Saturday and Sunday.⁴ Cliff has also worked at the 49th Street depot between 10th and 11th Avenues where the delivery windows begin at 4 pm. Runners report to work there at 3:45 pm.

Testimony Relating to Greg Schellenberg

Greg Schellenberg testified that he has worked for the United Wire Pension Fund, the fund for members of Local 810, since about 2002. Schellenberg is a systems engineer earning about \$55,000 per annum. He performs programming and infrastructure support for his employer's web site and e mail.

Schellenberg applied for work as a "walker/runner" with Respondent on an application which he dated July 14, 2004. He did not list his current employer on his application. Schellenberg stated that he was not sent to Respondent by Local 810; he decided on his own to apply for work to see whether Union members could work for the company. Schellenberg denied knowledge that Local 810 was organizing Respondent when he applied for a job with the company.

Schellenberg recalled that he was hired by Respondent as a full time runner on Friday,

³ The exception is one depot which does not begin deliveries until 4 pm.

⁴ When the first window begins at 2 pm the truck arrives at the depot around 1 or 1:30 pm.

July 16, 2004.⁵ After a period of orientation on July 16, Schellenberg began work on Monday, July 19. Schellenberg testified that his immediate supervisor was Felix Cabrera.⁶ According to Schellenberg he reported to work at the Long Island City facility on July 19 between 9 and 10 am. Cabrera instructed Schellenberg and other trainees to get into a truck which drove to 92nd Street and Broadway. There, they loaded groceries from the truck to a cart and delivered the cartons until 10 pm. Schellenberg stated that the delivery windows at the 92nd Street and Broadway location were from 10 am to noon, noon to 2pm, 2 pm to 4 pm, 4 pm to 6 pm, 6 pm to 8 pm and 8 pm to 10 pm.

Schellenberg testified that Cabrera instructed him and the members of the crew to report to 92nd Street and Broadway between 9 am and 10 am the next day.⁷ According to Schellenberg, on Tuesday, July 20 he traveled by subway to the 92nd Street and Broadway location arriving between 9 and 10 am. The truck was parked at the location and there were workers at the rear of the truck waiting for the first delivery window to begin. Schellenberg also noticed a man in a leather jacket with the employees. The man was holding cards in his hand and he gave Schellenberg a card and asked whether he wanted to join the Union.⁸ Schellenberg read the card, which was an authorization card for Local 810, and then put the card in the lower right front pocket of the jacket he was wearing. Schellenberg testified that he then looked up and saw Cabrera and noticed that the other workers were no longer there. Cabrera said, "what the fuck is going on here? What happened here?" Cabrera yelled, "What the fuck is in your hand?" Schellenberg stated that he still had his hand in his pocket, so he took the card out of the pocket and put it in the left inside pocket of his jacket. Cabrera then reached into Schellenberg's pocket and removed the card. Waving the card as he yelled at Schellenberg, Cabrera said, "Now you're part of this fucking shit." Cabrera ripped up the Union authorization card and put it in the trash can on the street. Then Cabrera asked Schellenberg, "Are you still fucking here?" As Schellenberg backed away from him, Cabrera said, "Get the fuck out of here. Don't ever come back here." Schellenberg walked to the subway and left the area.

Schellenberg stated that the jacket he was wearing on July 20, 2004 was the same jacket he brought to the instant hearing to demonstrate which pockets were involved in the stowing and removal of the Union authorization card. The jacket Schellenberg claimed he was wearing that day is a black, three-quarter length garment with a quilted and padded lining. Publicly available weather records show that in New York City on July 20, 2004 the actual low temperature was 70 degrees Fahrenheit and the actual high temperature was 84 degrees Fahrenheit.⁹

Schellenberg testified that later on July 20 he telephoned Michael Armstrong, the

⁵ He did not quit his job with the United Wire Pension fund nor did he take a leave of absence.

⁶ Respondent admitted that at the time material to the instant case Cabrera was a transportation department supervisor and an agent of Respondent within the meaning of Section 2 (11) of the Act.

⁷ Schellenberg said it was not true that the depot trucks arrived after 1 pm and it was not true that the runners were told to report to the depot at 1:30 pm.

⁸ Schellenberg testified that on July 20, 2004 he did not know the identity of the man with the Union cards.

⁹ This information was obtained at www.wunderground.com/history/airport/KNYC. The temperature was recorded at JFK airport.

recruiting manager in Respondent's human resources department.¹⁰ Schellenberg told Armstrong what had happened and asked whether he was fired. Armstrong said he would call back, but Schellenberg never heard from him. Schellenberg later served as a Union observer in the election conducted in Case No 29-RC-10245.

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John Kasper has been an organizer and field representative for Local 810 since March 2004. He was involved in the organizing effort at Fresh Direct. Kasper stated that he gave out Union authorization cards near the facility in Long Island City and he organized at the depots in Manhattan. He generally arrived at the depots beginning at 2:30 or 3 pm. Kasper visited the Broadway and 92nd Street depot every day in July. He met Schellenberg there for the first time when he drove up to the depot and saw a new face at the rear of the truck. Kasper recalled that other runners were present when he drove up. Kasper identified himself to Schellenberg, asked whether he was interested in the Union and then handed him a card. As Schellenberg read the card, Kasper saw Cabrera drive up to the location.¹¹ Kasper testified that he told Schellenberg to put the card away. Then Kasper got into his own vehicle. According to Kasper, as he was driving away he heard yelling and he saw Cabrera waving a piece of white paper. He heard Cabrera tell Schellenberg, "Get the fuck out of here and don't come back." At this point, Kasper stated, he did not see any other runners near Cabrera and Schellenberg. Kasper recalled that he arrived at the 92nd Street depot between 3 and 5 pm on the day of this occurrence. He said that Schellenberg was wearing a black jacket.

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Kasper testified that he saw Schellenberg again at the Union hall in August and learned his name and that he built web sites. Kasper testified that Schellenberg was not a salt for the Union.

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Anthony Onesto is the Director of Human Resources for Respondent. Onesto testified that runners fill out a time sheet to show how many hours they work each day. Onesto stated that within the first 90 days of employment if an employee is a "no call-no show", this is considered a voluntary quit and is cause for immediate termination. Onesto described the very high turnover at the company, recalling that about 47% of employees abandoned their jobs between May 1 and November 1, 2004. Onesto brought Schellenberg's personnel file to the instant hearing. The contents of the file show that Schellenberg was paid for his initial orientation time on Friday, July 16, 2004 and he was paid for 10 ½ hours of work on Monday, July 19. His time card shows no hours worked on July 20. Cabrera told Onesto that Schellenberg was a "no show" on July 20, and as a result he was automatically removed from the payroll on Onesto's orders and without discussion with any other managers. Onesto stated that he did not know whether Schellenberg supported the Union when his name was removed from the payroll.

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Onesto testified that Cabrera had been switched from being a supervisor to a helper at some unstated time in the past. Cabrera no longer works for Respondent. Respondent did not call Cabrera to testify herein and did not explain the circumstances of his separation from employment with the company.

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Respondent called Leroy Montano to testify herein. Montano was hired by Respondent as a runner on July 16, 2004 and at the time of the instant hearing he was a truck driver for the

¹⁰ Armstrong is an admitted supervisor of Respondent within the meaning of Section 2 (11) of the Act.

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¹¹ Kasper recognized Cabrera as a supervisor of Respondent and he was familiar with his vehicle.

company. Montano testified that he met Schellenberg at orientation on Friday, July 16 2004. Montano recalled that Schellenberg borrowed his pen on this occasion. Montano worked at the 49th Street depot on Monday, July 19. He was told to report to the warehouse at 12:30 pm the next day. Montano arrived at the plant at around 1 pm and he saw Cabrera and Schellenberg outside the facility. Cabrera told the two men that there were no more 1 pm routes available and he instructed them to return at 3 pm. Montano and Schellenberg then walked to a deli and they ate lunch together. Montano was dispatched on a truck at 3 or 3:30 pm that day. He did not see Schellenberg there but he did see him again during the September 28, 2004 election at a hotel polling place.

Cliff testified about her whereabouts on July 20, 2004. She recalled seeing Cabrera at the Long Island City facility during the afternoon and evening hours.

Schellenberg testified on rebuttal that he never saw Montano, never had lunch with him and never spoke to him. He denied being at the facility in Long Island City on July 20 and he denied abandoning his job. Schellenberg said that he ate lunch on July 20 "in the back of the Union hall" at about 2 or 3 pm.

B. Discussion and Conclusions

I credit the testimony of Moore and Cliff that the first delivery window at the Broadway and 93rd Street depot on Tuesdays begins at 2 pm. I credit Moore's testimony that runners are directed to arrive at that depot at 1:45 pm and I credit Cliff's testimony that the trucks usually arrive at that depot around 1 or 1:30 pm. I also credit the testimony of Kasper that during the 2004 organizing campaign he generally arrived at the depots beginning at 2:30 or 3 pm. I note that Kasper stated that on July 20, 2004 he witnessed an incident between Cabrera and Schellenberg at the 93rd Street depot between 3 and 5 pm. Thus, I find that Schellenberg did not report to the Broadway and 93rd Street depot between 9 and 10 am on July 20, as he testified herein, and that he did not see the truck and the other workers at that time. I also find that he did not encounter Kasper and Cabrera between 9 and 10 am. I find it significant that Schellenberg specifically and vehemently denied that the depot trucks arrive after 1 pm and that runners are instructed to report to the depot at 1:30 pm. I find that Schellenberg's account of the events of July 20 is fatally inaccurate.

Kasper testified that on July 20 he arrived at the depot between 3 and 5 pm. By Schellenberg's account, he was already long gone from the depot location by that time and he was having lunch "in the back of the Union hall" that day at about 2 or 3 pm.

Based on the discrepancies in the accounts given by Kasper and Schellenberg, and based on the fact that Schellenberg's account is impossible to believe in view of the established company practice, I am unable to rely on these witnesses. I find that the General Counsel has not presented credible evidence to establish a prima facie case that Respondent destroyed Union materials and interrogated and terminated Schellenberg in violation of Section 8 (a) (1) and (3) of the Act.

Additionally, Schellenberg's demonstration involving the jacket he purportedly wore on July 20 was unconvincing. The jacket produced by Schellenberg is a padded, quilted three-quarter length garment. Manifestly, such a jacket would not have been worn to perform strenuous manual labor on a day when the low temperature was 70 and the high temperature reached 84 degrees. This factor reinforces the conclusion I reached above that Schellenberg and Kasper were not truthful in their description of their activities on July 20, 2004.

Thus, I credit Onesto that Schellenberg was taken off the payroll because he did not present himself for work on July 20, 2004.

Because I have found that Schellenberg and Kasper were not reliable witnesses, I need not discuss the testimony of Cliff and Montano as it relates to the events of July 20, 2004. Nor need I discuss Respondent's arguments that Schellenberg lied about his knowledge of the Union organizing campaign and lied on his application form and that Schellenberg had no intention of working for the company and abandoning his full-time employment with the United Wire Pension Fund.

Conclusions of Law

1. The General Counsel has not shown that Respondent has violated the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Eleanor MacDonald
Administrative Law Judge

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.